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No. 71-941

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRED FERRARA and ARTHUR RUSSELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the Southern District of New York, petitioners, officers of a local union, were convicted on nine counts charging various violations of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq.*). Ferrara was given concurrent six months sentences on two counts, and a suspended three year sentence on the remaining counts on the condition that he repay $17,000 to the local union and publicize the sentence in the union newspaper. Russell was fined $500 on the first two

counts, and given a suspended two-year sentence on the remaining counts on condition that he repay $5,000 to the local union. The court of appeals reversed the conviction on the first two counts (for which Russell was fined and Ferrara was given an unsuspended prison sentence) and affirmed the conviction on the remaining counts (Pet. App. A).

The two counts on which the court of appeals reversed the convictions involved loans which petitioners were charged with causing the local union to make to a third union officer, while the remaining counts related to unauthorized union expenditures which petitioners caused to be made for the benefit of themselves and others. The officer who received the loans (James Gleason) testified concerning the loans, and also stated that the expenditures involved in the remaining counts were unauthorized and not, as petitioners contended, for a valid union purpose. At the conclusion of his direct testimony, the minutes of his testimony before the grand jury that indicted petitioners were supplied to defense counsel. After *in camera* inspection, the trial judge refused to order production of the minutes of Gleason's testimony before another grand jury, which had returned a separate and then pending indictment against petitioners based on a different violation.

Petitioners' sole contention here is that this latter ruling constituted reversible error, in support of which they cite *Dennis* v. *United States*, 384 U.S. 855. But *Dennis* is not in point with respect to the present situation. In holding that the government must disclose its trial witness' prior grand jury testimony, the Court

drew an analogy to the disclosure of prior statements required by the Jencks Act, 18 U.S.C. 3500 (*id.* at 870-871). That statute expressly states that it applies only if the prior statement "relates to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)), and provides for *in camera* inspection by the trial court to determine whether the relationship test is met (18 U.S.C. 3500(c)). Thus, the statute on which *Dennis* is premised envisions precisely the type of *in camera* inspection and relationship test that was used here. Moreover, Congress has amended the Jencks Act to include grand jury testimony within the "statements" that must be disclosed under it. See 18 U.S.C. 3500(e)(3), added October 15, 1970.[1] While the result in *Dennis* is now specifically mandated by the statute, it is subject to *in camera* inspection and testing pursuant to Sections 3500(b) and (c), reflecting a congressional determination that the *Dennis* result should be limited in this fashion.

The trial judge therefore properly considered *in camera* Gleason's testimony before the second grand jury and, based on his conclusion that "it has nothing whatsoever to do with the testimony of Mr. Gleason in this trial" (Pet. 8, n. 8), correctly refused to order its production. This ruling necessarily turns on the

[1] Trial of this case commenced on October 13, 1970. The demand for Gleason's prior grand jury testimony was made the next day, and the minutes of the testimony before the other grand jury were submitted to the trial court for *in camera* inspection on October 15, 1970.

particular facts presented, and does not warrant further review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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[1] Contrary to petitioners' assertion (Pet. 13-14), *United States* v. *Hughes*, 413 F. 2d 1244 (C.A. 5), certiorari granted *sub nom. United States* v. *Gifford-Hill American, Inc.*, 396 U.S. 984, vacated as moot, 397 U.S. 93, is not in conflict with the decision below. In that case, unlike the present one, both investigations dealt with the same offense (413 F. 2d at 1250, n. 14). The court of appeals, as petitioners concede (Pet. 13), ordered production only of grand jury documents which related to "the existence of double jeopardy" and thus met the "requirement of materiality to the preparation of the defense" (413 F. 2d at 1257). The district court here applied this same test in determining whether production of the second grand jury transcript should be ordered.

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